United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-2106

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-2106

BRIEF AND APPENDIX FOR THE APPELLEE

TABLE OF CONTENTS

TABLE OF CASES

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-2106

UNITED STATES OF AMERICA,

Appellee,

—against—

JOHN S. WOJTOWICZ,

Appellant.

BRIEF FOR THE APPELLEE

Preliminary Statement

Appellant John Stanley Wojtowicz, appeals from an order dated January 15, 1976, in the United States District Court for the Eastern District of New York (Platt, J.), which denied without an evidentiary hearing, his motion to vacate or modify his sentence, pursuant to Title 28, United States Code, Section 2255.[1]

Appellant's collateral attack on his sentence in the district court consisted of two claims. First, that his attorney's alleged statement to him regarding the length of sentence he would receive induced his plea. He argued

---

[1] Appellant's companion motion to reduce his sentence pursuant to Rule 35, Federal Rules of Criminal Procedure was also denied by Judge Platt in his Memorandum and Order dated January 15, 1976.

that this statement requires that his sentence be reduced. Second, that the federal court lacked jurisdiction over the defense of bank robbery.

On appeal, appellant has abandoned his jurisdictional argument and expanded his argument regarding the alleged sentence promise. No longer content with obtaining a mere reduction of sentence, appellant now desires to have his guilty plea withdrawn. To support this newly sought relief, appellant claims that his guilty plea was involuntary because of his psychiatric background and his condition at the time of sentencing. Also, for the first time, on this appeal, appellant contends that he was denied the effective assistance of counsel.

Statement of Facts

(1)

On August 31, 1972, appellant John Stanley Wojtowicz was indicted for his participation on August 22, 1972, in an armed robbery of a branch office of the Chase Manhattan Bank located at Avenue P and East Third Street, Brooklyn, New York. The four count indictment charged appellant and co-defendant Robert Arthur Westenberg[1] with violations of Title 18, United States Code, Sections 2113(a), (d) and (e) and Section 371.

On February 16, 1973, appellant offered to withdraw his previously entered not guilty plea and to plead guilty to Count Two of the indictment pursuant to an agreement

---

[1] On March 23, 1973, defendant Westenberg pled guilty to Count Four (conspiracy) and on April 23, 1973, was sentenced to two years imprisonment.

Mark A. Landsman, his court-appointed, but subsequently retained, attorney had reached with the government. This agreement, which was expressed by appellant himself during the Rule 11 colloquy, was that the remaining counts in the indictment would be dismissed at the time of appellant's sentencing upon his plea to Count Two, which carried a maximum penalty of 25 years imprisonment and a $10,000 fine (A-4, p. 7).

Prior to reaching this agreement, appellant and his trial attorney, an experienced criminal lawyer, explored the possibility of a defense of insanity. On September 12, 1972, upon the request of appellant's counsel, the district court directed a psychiatric examination of appellant. Appellant was found to be competent to stand trial. (See Government Appendix, Exhibit 2).

At the time of the plea of guilty, the district court entered into a lengthy discussion with appellant, eliciting certain background information. Appellant advised the court that he was 27 years old and a high school graduate (A-4, p. 4). In response to the court's inquiry regarding any treatment for mental or emotional problems, appellant stated that he had been treated as an out-patient at St. Vincent's Hospital (A-4, p. 4). Further inquiry as to this treatment revealed that appellant had visited his male-wife's psychiatrist in March 1972 (A-4, p. 5).

The court continued to question appellant concerning his desire to plead guilty, his satisfaction with his attorney and the nature of the charge to which he would plead (A-4, pp. 6-10). Appellant stated that no threats or promises had been made to him to induce him to plead guilty (A-

---

[1] Numbers in parenthesis preceded by "A" refer to exhibits in appellant's appendix.

4, p. 8). Thereafter, appellant was advised by Judge Travia of the maximum penalty which the court could impose.[4] Also, the agreement reached between the government and appellant was set forth, in its entirety, on the record (A-4, pp. 7-8).

The court then read Count Two of the indictment to appellant and, as required, advised him of various rights he was waiving by pleading guilty (A-4, pp. 14-15). Thereafter, appellant stated in his own words his involvement in the bank robbery (A-4, pp. 12-14).

The court concluded the line of inquiry by questioning as follows (A-4, pp. 15-17):

> The Court: Do you know, too, that if you plead guilty to this count, that the Court has the power to and may send you to prison for a period of up to 25 years and fine you in a sum of up to $25,000.00 or both?
>
> The Defendant: Yes, your Honor.
>
> The Court: You know that because you have been told that by your lawyer? Right?
>
> The Defendant: Yes, your Honor.
>
> The Court: This has been discussed between you and your lawyer?
>
> The Defendant: Yes, your Honor.
>
> The Court: You told me earlier that after such a discussion, you feel you want to plead guilty to this count?

---

[4] As noted by Judge Platt in his Memorandum and Order dated January 15, 1976 (A-3), Judge Travia erred in indicating a $25,000 fine was possible under Count Two of the indictment. Count Two, which charged a violation of 18 U.S.C. § 2113(d) provides for a fine of $10,000.

The Defendant: Yes, your Honor.

The Court: After hearing your rights, do you still desire to plead guilty? Look at me.

The Defendant: Yes, your Honor.

The Court: Has anyone made any promises of any kind to you or threats of any kind to induce you to plead guilty other than the promise that the other counts in this indictment will be dismissed?

The Defendant: No, your Honor.

The Court: No one told you what I may do?

The Defendant: No, your Honor.

The Court: But they did tell you that I could sentence you to the terms that I just mentioned, up to 25 years and up to $25,000.00 or both?

The Defendant: Yes, your Honor.

The Court: Nobody inferred to you that I might do less?

The Defendant: No, your Honor.

The Court: Is this plea being made by you voluntarily?

The Defendant: Yes, your Honor.

The Court: Are you making this plea of guilty because you, in fact, did commit what Count 2 that I read to you and which you said you understand alleges you committed?

The Defendant: Yes, your Honor.

The Court: Mr. Landsman, is there any reason that you know of why the Court should not accept this plea?

Mr. Landsman: No, sir, no reason.

The Court: Did you advise this defendant, after a review of the case with him, of his rights and the possibilities of a plea and the possibility of a trial, the risk of trial?

Mr. Landsman: Yes, your Honor, many, many times.

(2)

On April 23, 1973, prior to imposing sentence, a hearing was held regarding appellant's apparent dissatisfaction with his attorney. Appellant argued that his attorney failed to raise various motions arising out of what he claimed was an assault upon him by F.B.I. agents at the time of his arrest. Appellant also disagreed with his attorney's failure to contest the results of the court-ordered psychiatric examination which found him to be competent to stand trial (A-5, pp. 9-13). Appellant proceeded to give a lengthy soliloquy concerning his decision to plead guilty, and for the first time, stated that he had plead guilty so that he would not lose his male-wife (A-5, pp. 13-15). This statement appeared to be a claim that his plea may have been based on factors extraneous to guilt. However, upon further questioning by the court appellant admitted that he had not raised this at the time of his guilty plea and that he was in fact guilty of the offense charged (A-5, pp. 15-16).

Upon appellant's apparent ambivalence as to whether or not to move to withdraw his plea, the court adjourned the sentencing so that appellant could confer with his attorney and family to reconsider his course of action (A-5, p. 26).[5]

---

[5] Immediately prior to this adjournment the court queried appellant concerning his plea (A-5, p. 24-25):

The Court: Tell me very frankly, were you telling the truth when you pleaded guilty to a count here? Were you telling the truth on that day?

Defendant Wojtowicz: Yes, sir.

The Court: And you pleaded guilty before me to

[Footnote continued on following page]

Following the adjournment the court again made inquiry of appellant (A-5, pp. 27-29):

> The Court: Mr. Wojtowicz, during the conversation that occurred between your mother, your wife, your lawyer, Mr. Landsman, during the recess, did you have occasion to again think about whether you ought to withdraw your plea?
>
> Defendant Wojtowicz: Yes.
>
> The Court: What is your desire with respect to that?
>
> Defendant Wojtowicz: I wish to plead guilty.
>
> The Court: You want the plea that you made previously to stand?
>
> Defendant Wojtowicz: Yes.
>
> The Court: You are sure you knew what you are doing?
>
> Defendant Wojtowicz: Yes, your Honor.
>
> The Court: Your request for a change of lawyer, how do you feel about that?
>
> Defendant Wojtowicz: I'm withdrawing that request.

Count Two of the indictment, which carried a maximum punishment of 25 years in prison?

Defendant Wojtowicz: Yes.

The Court: And at that time I want [sic] very thoroughly into your rights and privileges?

Defendant Wojtowicz: Yes.

The Court: And you indicated at that time that you wanted to plead guilty?

Defendant Wojtowicz: Yes.

The Court: And you in fact were guilty of the crime charged in that count?

Defendant Wojtowicz: Yes.

The Court: You still feel the same?

Defendant Wojtowicz: Yes.

The Court: Apparently there is no reason to change your plea?

Defendant Wojtowicz: Correct, your Honor.

The Court: You have talked to Mr. Landsman again?

Defendant Wojtowicz: Yes.

The Court: And frankly what you had told me earlier about your problems with Mr. Landsman are something other than this case, namely your question of your fee or your contract with him for the other book or movie, whatever it is, those rights, that, of course you have. You know you have a full right to proceed against Mr. Landsman if you wish, if you think he should not have gotten that money or he should have gotten less, that's a problem between you and him. I'm interested in his representation of you in this case. Are you satisfied that he's doing the best he knows how, and you want him to continue as your lawyer in this sentencing?

Defendant Wojtowicz: Yes, your Honor.

The Court: Tell me when you say yes you want him to continue, you are satisfied with him?

Defendant Wojtowicz: Yes.

Thereafter, having satisfied himself of appellant's desire to keep both his guilty plea and his attorney, the court again reviewed with appellant the rights that he was waiving by pleading guilty and the consequences he faced and reestablished the voluntariness of his previously entered plea (A-5, pp. 29-33).

There then followed a lengthy presentation to the court by appellant's attorney regarding mitigating factors for the court's consideration in sentencing. Moreover, the court had before it not only a pre-sentence report but also the results of the psychiatric examination conducted by Dr. Chaitin pursuant to the request made by appellant's attorney under 18 U.S.C. § 4244. For his allocution,

appellant eloquently revealed his motives for the robbery, claiming he did it, though he knew it was wrong, to save his male-wife's life. Judge Travia then sentenced appellant to twenty years imprisonment (A-5, pp. 39-40, 43-51).

(3)

On October 21, 1975, appellant filed the instant petition collaterally attacking his conviction. In seeking to have his sentence reduced, appellant claimed that his guilty plea was induced by his attorney's statement that he would be sentenced to ten or fifteen years imprisonment rather than the twenty years he in fact received (A-7, p. 3).[6]

The support for appellant's motion was premised upon affidavits submitted by his mother, female-wife and male-wife, who jointly averred that appellant's counsel told them that appellant would receive a sentence of ten to fifteen years upon his plea of guilty. Relying upon this representation made to them, they urged appellant to plead guilty (A-7). Only through an affidavit of one George Heath, a fellow prisoner and "extremely close friend" of appellant acting as a "subprofessional" for appellant, was it alleged that appellant himself was actually advised by his attorney that his sentence would be no more than ten to fifteen years imprisonment (A-7). Appellant himself, however, does not allege that his attorney made such a promise to him.

Included in the government's response to appellant's petition was an affidavit of appellant's lawyer, who

---

[6] Appellant also claimed that the federal court lacked jurisdiction over the offense of bank robbery. This contention, which was rejected by the district court, has been abandoned by appellant on appeal.

stated that he had never advised appellant or anyone associated with the case of the length of sentence appellant would receive if he pleaded guilty (See Government's Appendix, Exhibit A). In his decision, Judge Platt relied upon the minutes of appellant's plea and sentence and concluded that appellant could not have been ". . . proceeding under a reasonable belief that his attorney's alleged sentence estimate was correct" (A-3, p. 6). The court specifically pointed out the four times Judge Travia advised appellant of the penalties which could be imposed and the fact that Judge Travia made it abundantly clear that he alone would determine the sentence to be imposed (A-3, pp. 5-6).

The court went on to find that, even assuming such a sentence estimate had been predicted, appellant had failed ". . . to meet the burden of justifying his mistaken reliance on his attorney's prediction". (A-3, p. 8). Judge Platt concluded this portion of his decision by characterizing appellant's contention as nothing more than ". . . a case of disappointment at the sentence he ultimately received". (A-3, p. 9).

(4)

Thereafter, appellant moved for reconsideration of the district court's dismissal of his § 2255 petition. In support of his motion appellant submitted an affidavit which, for the first time, related his account of an apparent suicide attempt which occurred the morning of his sentencing (A-10). Appellant, in a curious document, also implied that because of his dissatisfaction with his lawyer, he failed to relate to the court the promise regarding his sentence made to him by his attorney (A-9, p. 4). On February 26, 1976, Judge Platt denied appellant's motion for reconsideration.

At no time in either appellant's original § 2255 motion or his motion to reconsider did he: (1) state specifically that his attorney made a promise to him directly that his sentence would be ten to fifteen years if he plead guilty; (2) claim that such a promise, if told to him by his attorney or others, was relied upon by him as an inducement to plead guilty; (3) contend that his plea was not voluntarily made; or (4) assert his innocence of the crime charged.

ARGUMENT

POINT I

The district court properly rejected appellant's Title 28, U.S.C., Section 2255 motion without an evidentiary hearing.

Appellant contends that the district court improperly denied an evidentiary hearing on his § 2255 motion originally brought to obtain a sentence reduction. He now contends that he should have been afforded a hearing to determine the voluntariness of his guilty plea and his competence at the time of sentencing. According to appellant, factual allegations were raised in his affidavit concerning his "attempted suicide" prior to his sentencing which, when considered with other factors existing at the time, raise serious doubts as to his competency. He contends that these factors are not controverted by the files and records in this case. Appellant relies upon three specific factors which he claims support his argument that there is an issue as to his competency at sentencing and the voluntariness of his guilty plea which required a hearing: (1) his prior psychiatric treatment; (2) the alleged coercion imposed upon him by his family, inducing him to plead guilty; and (3) the "promise" of a lesser sentence made to him by his attorney.

In the district court's well-reasoned opinion, Judge Platt properly rejected appellant's claim that undue coercion to plead guilty was imposed upon him by members of his family and that his plea was induced by an alleged promise of a lesser sentence made by appellant's counsel. These contentions, supported by affidavits submitted by appellant's mother, wife, male-wife and friend, but significantly not by an affidavit of appellant himself, were conclusively refuted by the minutes of appellant's plea and sentencing. We submit that appellant's allegations are insufficient, on their face, to require the relief available under § 2255.

It is important to note that appellant's claim of incompetence at the time of sentencing was not raised below until after the district court denied his § 2255 motion. In moving for reconsideration of the January 15, 1976, decision denying his motion, appellant submitted an affidavit in which he related, for the first time, that he had "attempted suicide" prior to his sentencing, arguing that this established that he was mentally incompetent at the time of sentencing. The district court correctly rejected appellant's motion to reconsider its previous decision. Indeed, appellant's belated competency claim is controverted by the minutes of the plea and sentencing, as well as the report of appellant's psychiatric examination which was before Judge Travia at the time of appellant's guilty plea and had been included as part of the pre-sentencing material before Judge Travia at the time of sentencing. The government contends, therefore, that the district court properly rejected this additional claim and was not required to hold an evidentiary hearing.

A. Appellant was Competent at the Time of His Guilty Plea and Sentencing.

Appellant now contends that his "attempted suicide" prior to sentencing left him in such a state that he was

incompetent to be sentenced. Although this argument was belatedly presented to the district court, and then only in the context of a motion for reconsideration of the decision denying the sought-after reduction of sentence, the government will respond to it first inasmuch as it appears to be appellant's main argument on this appeal. This "suicide attempt", so the argument runs, considered with prior psychiatric difficulties, also raises a serious question regarding his competency at the time of the plea, entered two months prior to his sentencing, which required Judge Platt to conduct an evidentiary hearing.

However, scrutiny of the minutes of appellant's plea and sentencing belie his argument. The record indicates that appellant was completely lucid and responsive to Judge Travia's questions and evidenced no mental deficiency or inability to understand the proceedings. Moreover, at both the plea and sentencing, Judge Travia had before him the psychiatric examination of appellant, which had been conducted at his lawyer's request and which, after full evaluation and consideration of appellant's prior psychiatric treatment, determined that he was competent.

Appellant does not contend, nor can he, that his plea was not entered in full compliance with Rule 11. Judge Travia questioned appellant at length regarding his desire to plead guilty, the consequences he faced and the factual basis for his guilty plea (A-4). Appellant's articulate answers to these questions and his own inquiry regarding the dismissal of the remaining counts in the indictment hardly indicate irrational behavior or a person lacking in competence. (A-4, p. 1). Cf. *Lee* v. *Wiman*, 280 F.2d 257, 265 (5th Cir.), *cert. denied*, 364 U.S. 886 (1960); *United States* v. *Voccteras*, 500 F.2d 1210, 1212 (2d Cir. 1974), *cert. denied*, 419 U.S. 1069 (1975). Appellant's attention to detail (A-4, p. 10) and his re-

quest for the record to be read by the stenographer (A-4, p. 7) indicated alertness on his part. Finally, Judge Travia elicited from appellant the admission that he knew what he was doing at the time of the crime (A-5, p. 5).

Moreover, at the time of appellant's guilty plea, Judge Travia had before him Dr. Chaitin's report of the psychiatric examination of appellant which found him competent. (Government's Appendix, Exhibit B). In response to a question by the court, appellant related his prior psychiatric treatment (A-4, pp. 4, 5). However, since this was considered by Dr. Chaitin in his analysis of appellant, further colloquy by Judge Travia on his point was unnecessary. Certainly, in reviewing the dialogue which occurred at the time of appellant's guilty plea, taken together with Dr. Chaitin's psychiatric examination, Judge Travia could properly find, as he did, that appellant knowingly waived his rights and voluntarily entered his guilty plea. There was no cause to further inquire into appellant's competence. *Dusky* v. *United States*, 362 U.S. 402 (1960); *United States* v. *Marshall*, 458 F.2d 446 (2d Cir. 1972). Thus, based on this record and having before him the belated bald assertion of appellant regarding his competency at the time of his sentencing, Judge Platt had no reason to *sua sponte*, consider the validity of appellant's guilty plea.

Similarly, Judge Platt properly denied appellant's motion to reconsider the denial of his § 2255 motion based upon appellant's affidavit in which he claimed he was completely oblivous to the proceedings at the time of sentencing. (A-10). Here also, the minutes of the sentencing clearly demonstrate appellant's complete awareness of the proceedings and indicates rational decision making by appellant regarding whether or not to move to dismiss his attorney, to seek an adjournment of his

sentencing and whether or not to withdraw his guilty plea (A-5). Appellant did not merely respond to these issues; rather he brought them to the court's attention. We contend that this fact further demonstrates appellant's reasoning powers. (A-5, pp. 6, 8). This record contrasts sharply with that in *Saddler* v. *United States*, 531 F.2d 83 (2d Cir. 1976), where the defendant's irrational state was plain even to a layman.

The methodical manner in which the district court proceeded to accept the plea of guilty and impose sentence is of noteworthy importance. The lengthy proceedings, during which extensive colloquy between the court and appellant occurred, provided Judge Travia with a considerable opportunity to personally observe appellant. The decision by Judge Travia to proceed with the sentencing contradicts appellant's claim that his condition was so deteriorated that he could barely recall the events (A-10).[1] Also, at no time during the sentencing was there a request for an adjournment. Mr. Landsman, who was fully aware of appellant's condition at the time of sentencing, obviously concluded appellant was able to proceed. While Mr. Landsman did subsequently comment on appellant's physical condition at the time of sentencing in the Rule 35 motion to reduce sentence, at no time did he contend that appellant was unable to proceed at his sentencing (A-6). Rather, he merely alleged that appellant was "in a poor physical condition" and "highly nervous", a condition not unusual or unique to appellant under the circumstances.

The personal observations of both Judge Travia and Mr. Landsman, neither one novices to the courtroom, as well as an objective evaluation of the sentencing minutes, refute appellant's claim that he was incompetent to be

[1] Appellant similarly told the examining psychiatrist that he did not remember the details of the robbery, but the psychiatrist had the opinion that he was malingering. (Government's Appendix, Exhibit B, p. 10A).

sentenced. In determining the need for a competency hearing, the court's first-hand observations are significant. *United States* v. *Voccteras*, *supra*; *Mirra* v. *United States*, 379 F.2d 782, 787 (2d Cir.), *cert. denied*, 389 U.S. 1022 (1967); *United States* v. *Curtis*, 520 F.2d 1300, 1304 (1st Cir. 1975). Judge Platt, who had this record before him, properly rejected appellant's claim without the necessity of an evidentiary hearing.[7]

B. Appellant's Plea was not a Product of Coercion.

Appellant argues that the district court improperly denied a hearing on his claim that his plea was the product of family coercion and of a false sentence promise. Appellant relies for the most part upon the affidavits of his family, which allege that appellant's attorney had told the family members, including appellant's male-wife, that he would not receive a sentence of more than ten to fifteen years,[8] and upon extra-judicial news accounts of the plea and sentence. Appellant argued in the district court that the proper remedy was a reduction in sentence to conform to his expectations. He has expanded that argument and now claims that the sentence estimate and consequent family exhortations made his

---

[7] Not only does the timing of appellant's affidavit make it suspect on its facts, but the analogy between appellant's failure to remember his sentencing in his affidavit and his similar "memory lapses" with Dr. Chaitin regarding the bank robbery, make his instant argument disingenuous at best.

[8] The affidavits do not aver that this promise was communicated to the appellant by any of the affiants or that the appellant was aware of the alleged promise. As for his own misimpression, appellant alleged this fact very tenuously in his 2255 papers below (A. 9, p. 4) in the motion for reconsideration. In addition, appellant's claim in his brief that his trial counsel used his male-wife to extract a plea is contradicted by Mr. Landsman's statement that appellant requested that the male-wife be brought to see him. (A. 5, p. 17).

plea involuntary. Therefore, he asks that the plea be vacated.[10]

Regarding family pressure, this court recently considered a strikingly similar claim in *Lunz* v. *Henderson*, 533 F.2d 1322 (2d Cir. 1976). Lunz had been indicted for second degree murder, and his pregnant sister was brought to him by his counsel for the purpose of convincing him to plead guilty to second degree murder. Lunz claimed that he did so because he was afraid of endangering his sister's health. In rejecting his contention of coercion by his lawyer and sister, the court wrote:

> Advice—even strong urging—by those who have an accused's welfare at heart, based on the strength of the state's case and the weakness of the defense [an insanity defense], does not constitute undue coercion (cites omitted). . . . This is especially so where, as here, an accused's life was at stake.
>
> *Lunz* v. *Henderson*, *supra* at 1327.

Similarly, in the instant case, given the strength of the government's case, the weakness of the insanity defense (see Point II(c), *infra*), and the possibility of a death sentence, advice by appellant's counsel and family to plead guilty was not coercive.

As for the sentence promise, appellant alleges his own subjective misimpression as well as his family's. In his

---

[10] The district court wrote:

> It is important to point out that petitioner has not raised the issue of non-voluntariness of his plea requiring the setting aside of his conviction, but rather, that because of his expectation allegedly induced by his attorney, the Court should reduce his sentence. (A. 3, p. 2).

thorough opinion, Judge Platt found that the plea and sentencing minutes demonstrated that appellant was fully aware of the maximum sentence he faced and could not reasonably have believed that the sentence estimate, allegedly made by his lawyer, could have been correct. (A. 3, pp. 5-6). Judge Platt also wrote that, as a matter of law, an erroneous sentence estimate by a defense lawyer is insufficient to render a plea involuntary unless it raises to the level of a denial of effective assistance of counsel. Most importantly, Judge Platt stated the standard that must be met in order to show involuntariness on the basis of erroneous sentence estimate. That is, appellant must show by *objective*, not *subjective* evidence, that his mistaken impression was reasonably justified. *United States ex rel. Curtis* v. *Zelker*, 466 F.2d 1092 (2d Cir. 1972), *cert. denied*, 410 U.S. 945 (1973); *Mosher* v. *LaVallee*, 491 F.2d 1346 (2d Cir.), *cert. denied*, 416 U.S. 906 (1974); *United States ex rel. Oliver* v. *Vincent*, 498 F.2d 340 (2d Cir. 1974).

In the instant case, no such objective fact, such as a promise from a judge or prosecutor, *Santobello* v. *New York*, 404 U.S. 257 (1971); *Palermo* v. *Warden, Green Haven State Penitentiary*, — F.2d — (2d Cir.), slip op. 5939, decided Nov. 1, 1976, or a false promise that a sentencing agreement had been reached, *Mosher* v. *LaVallee*, *supra*, justifies any mistaken belief appellant may have held. Indeed, appellant alleged no objective facts at all, but relies solely on his so-called "subjective misimpression". (Appellant's Brief, p. 40). These allegations, however, are insufficient, as a matter of law, to afford § 2255 relief and to require a hearing. *Dalli* v. *United States*, 491 F.2d 758 (2d Cir. 1974); *United States* v. *Malcolm*, 432 F.2d 809, 812 (2d Cir. 1970).

POINT II

Appellant was afforded the effective assistance of counsel.

Appellant also contends, for the first time, that the district court erred in denying, without an evidentiary hearing, the claim of ineffective assistance of counsel. Appellant's appellate counsel now maintains that although never requested below, it was error for the court to not grant a hearing to explore the following claimed inadequacies of his representation at trial: (1) failure to bring to the attention of the sentencing court the defendant's suicide attempt, (2) lack of research and preparation, as evidenced by counsel's ignorance before the pleading day of the death penalty provided for in one of the counts of the indictment, (3) failure to conduct any significant exploration of the insanity defense, (4) conflict of interest arising from counsel's criminal and civil representation of the defendant, and (5) improper pressure in the form of a sentence promise to plead guilty. Appellant argues that these allegations, considered alone or in their totality, support his claim of ineffective representation.

We believe it is appropriate to note that the record reflects, contrary to appellate counsel's assertions, that trial counsel, an experienced criminal defense lawyer, performed in a professional manner in dealing with a difficult client in a difficult situation. Far from making a "farce and mockery of justice", trial counsel evidenced his awareness of his obligations both to his client and to the court:

> Mr. Landsman: . . . The defendant has asked me to do a lot of things for him which were not proper as a lawyer. (A. 5, p. 20) . . . . I've tried to explain to him that he's facing terrible punishment. He must do the most he can to reduce it. (A. 5, p. 20) . . . Give him an opportunity to consult with another lawyer. (A. 5, p. 21).

A. The Suicide Attempt

Appellant claims that trial counsel had to have known about his alleged pre-sentencing suicide attempt, and therefore his failure to bring this fact to the attention of the judge demonstrates incompetence. Appellant bases this supposition of knowledge upon *news articles*, only one of which presented to the court below,[11] and the attorney's affidavit submitted with the 1973 Rule 35 motion for reduction of sentence, in which he stated that appellant had "inflicted injuries upon himself." However, even assuming that counsel was aware of the alleged attempt at the time of sentencing, it is reasonable to assume that he evaluated his client's condition and decided that it did not require an adjournment.[12]

Nonetheless, there was nothing in the record below to support appellant's claim of having attempted suicide beyond the bare allegation in his 1976 letter to the district court submitted in connection with his motion for reconsideration (A-10). Appellant failed to produce medical records or corroborating affidavits concerning this attempt. Interestingly enough, appellant failed to raise this issue of attempted suicide until his claim of coercion by sentence-promise had been denied below. The issue of competence, therefore, appears entirely frivolous. If not, even a layman assisted by a "sub-professional" would have raised it at the first opportunity.

---

[11] The accuracy and impartiality of this article is not beyond dispute. Not only did the reporter fail to ascertain the correct name of the A.U.S.A. (Boyd, not Clarey), but also he admitted acting as the defendant's agent in participating in negotiations for film rights and issuing press releases (A-11).

[12] See *United States* v. *Miranda*, 458 F.2d 1179 (2d Cir.), *cert. denied* 409 U.S. 874 (1972) holding that a feigned suicide attempt would not lead a lawyer to question his client's competency.

Finally, appellant claims that he was virtually without counsel during sentencing because his attorney was defending his own performance rather than objectively advising appellant of his alternatives. This is meritless. The implication of this argument is that each and every time a defendant considers changing counsel, a new attorney should temporarily be appointed to aid him in that decision. Needless to say, this would impose an enormous burden on the court, and no case has so held. In any event, a recess was granted to permit the appellant to reconsider his alternatives and to fully discuss them with his lawyer and family. (A-5, p. 26). After this recess, appellant assured the court that he wished to proceed with sentencing and wanted Mr. Landsman to remain as his attorney. (A-5, p. 28). The record simply does not support appellant's belated claim that the alleged "suicide attempt" rendered him incompetent.[13]

B. Ignorance of Death Penalty

Appellant claims that the advice given by his counsel was tainted by the attorney's lack of knowledge of the possibility that the death penalty was imposable on one of the counts of the indictment. This is perhaps appellant's most frivolous claim. He fails to explain how he was prejudiced by this lack of knowledge of the more serious penalty. Indeed, the fact that trial counsel believed that the appellant was facing a possible life sentence (A-5, p. 23), rather than a capital sentence, would compel the conclusion that there would have been less motivation for counsel to attempt to persuade appellant to plead guilty. But, appellant's inability to point to any

[13] Appellant evidenced his competence during his allocution when he admitted that he knew that what he had done "was wrong". (A. 5, p. 48).

prejudice or even any suggested theory of prejudice renders the entire point specious.

C. Failure to Explore Insanity Defense

The record simply does not support appellant's argument that his trial counsel failed to explore the viability of the insanity defense. Indeed, it was at counsel's request that the § 4244 examination was conducted. Pursuant to the resulting court order, appellant was thereafter confined at Kings County Hospital for three weeks during which period he underwent psychiatric observation. Moreover, counsel submitted numerous documents to the examining psychiatrist that he thought would assist in the competency determination, including records of appellant's prior psychiatric treatment (A-5, p. 17; Government's Appendix, Ex. B, p. 11A). In addition, counsel raised the possibility that the defendant lacked the mental capability to commit a crime (A-5, p. 39). However, the examining psychiatrist found that not only was appellant competent to stand trial but was of above average intelligence. Appellant, who was kept at the hospital for this lengthy period, evidenced no psychosis. According to the report appellant was capable of understanding concepts of right and wrong, or at least legal and illegal. In the face of this exhaustive psychiatric report, it is understandable why trial counsel did not seek to obtain a second psychiatric opinion. There was simply nothing in the report to challenge.

Furthermore, appellant seeks to impose upon trial counsel the "duty to make every effort to investigate the viability of every possible line of defense before advising a client on the options open to him". While recognizing that counsel is not obliged to file frivolous or dilatory motions or to follow wasteful procedures, (ABA Standards of Professional Conduct, Canon EC 7-5),

the Government submits that counsel did investigate appellant's possible defenses. The record indicates that Mr. Landsman was familar with the potential testimony of the hostages (A-5, p. 41), gathered information about appellant from independent sources, including St. Vincent's Hospital and his family, and studied various writings of appellant, including a published article and his will, and specifically brought to the attention of the examining psychiatrist his own observations of appellant's conduct in court (Government's Appendix, Ex. B, p. 12a). There can be no question that counsel thoroughly investigated the viability of the insanity defense. Moreover, based on the contents of the psychiatric report, it would have been extremely unlikely that the court would have ordered another psychiatric examination *United States* v. *Durant*, — F.2d ——, slip. op., p. 635, (2d Cir.), decided Nov. 24, 1976, or that, even if such examination revealed findings completely at odds with the first, that a viable trial defense would have been established.

Similar complaints about ineffective counsel were rejected in *United States ex rel. Marcelin* v. *Mancusi*, 462 F.2d 36, (2d Cir.) *cert. denied*, 410 U.S. 917 (1973) and *Lunz* v. *Henderson*, 533 F.2d 1322 (2d Cir. 1976). In *Marcelin*, this Court wrote:

> And while the purpose of each of these examinations was to determine competence to stand trial, it does not seem altogether unreasonable for counsel to have assumed that the examining psychiatrists would have discovered and reported symptoms, had there been any, of legal insanity at the time of the commission of the crime . . . True, the two tests are different but not so different as to impose on counsel, under all the circumstances here disclosed, a duty to request a separate examination as to petitioner's sanity at the time of the commission of the crime. *United States ex rel. Marcelin* v. *Mancusi, supra*, at 44.

This is an even more compelling argument in the instant case, where the defendant was examined only one month after the commission of the crime.

In *Lunz* v. *Henderson*, *supra*, at fn. 7, p. 2157, this Court, adopting the rationale of a state court which had considered petitioner's claim, stated:

> An attorney must act on the facts presently before him and, in this case, assigned counsel had to balance the merits of an uncertain defense [insanity] against the real dangers of capital punishment. Under the circumstances, a negotiated plea could not be deemed an abandonment of the defendant's interests but rather a valid courtroom representation.

So too here. Counsel properly balanced the possibility of an insanity defense against the possibility of the death penalty, and his recommendation of a guilty plea cannot be faulted. And, this is especially so, where, as here, the proof of guilt was overwhelming. *United States ex rel. Marcelin* v. *Mancusi*, *supra*.

D. Negotiation of Movie Rights

Incredibly enough, appellant seeks relief from this Court based on his failure to reap greater riches from his crime. Appellate counsel now calls to this Court's attention the fact that trial counsel had represented appellant in both the civil and criminal aspects of his case and has assisted in negotiating appellant's rights for a book or movie about the crime. Appellant himself at first apparently had no objection to this arrangement but later expressed dissatisfaction with the result of the negotiations of the movie rights. However, as Judge Travia rightly pointed out, the question of movie rights had no

bearing on counsel's performance in the criminal case then before him (A-5, pp. 28, 29):

> THE COURT: And frankly what you had told me earlier about your problems with Mr. Landsman are something other than this case, namely your question of your fee or your contract with him for the other book or movie, whatever it is, those rights, that, of course you have. You know you have a full right to proceed against Mr. Landsman if you wish, if you think he should not have gotten that money or he should have gotten less, that's a problem between you and him. I'm interested in his representation of you in this case. Are you satisfied that he's doing the best he knows how, and you want him to continue as your lawyer in this sentencing?
>
> DEFENDANT WOJTOWICZ: Yes, your Honor.
>
> THE COURT: Tell me when you say you want him to continue, you are satisfied with him?
>
> DEFENDANT WOJTOWICZ: Yes.

Appellant attempts to buttress his argument by citing a footnote from the recent case of *Palermo* v. *Warden, Green Haven State Prison, supra.* However, the facts of *Palermo* are clearly distinguishable. The attorneys in *Palermo* had clear conflicts of interest with their client; they would only receive insurance rewards if the client turned in insured jewelry and pled guilty to robbery. In the instant case, appellant's negotiations for the movie rights were apparently completed and the money received before his plea (A. 5, p. 7). The fee was in no way contingent upon a guilty plea. Appellant has not established any conflict of interest. He is merely attempting to use

his disappointment at failure to profit more from his crime to discredit his diligent attorney."[14]

E. Sentence Estimate

Appellant presses once more his contention that he was induced to plead guilty because of a promise of a lighter sentence than he actually received. Judge Platt thoroughly discussed this issue in his opinion below and rejected the contention that it was a reason to reduce appellant's sentence. Appellant has now dusted off this old claim and fitted it with a new veneer—that of ineffective assistance of counsel. He now argues that if his lawyer induced him to plead by means of an erroneous sentence promise, he was denied effective assistance of counsel. Judge Platt wrote, however, "There has been no allegation that counsel representing petitioner performed in such an inept manner as to warrant the setting aside of the plea on that [erroneous advice as to sentence] basis." (A-3, p. 7).

We agree with Judge Platt that the source of appellant's grievances is disappointment over the sentence and the pecuniary gain he received from the proceeds of the book and movie sales. Indeed, a careful examination of the record fails to show that appellant's complaint is based on anything greater than disappointment. Appellant's trial counsel in no way misled appellant or his family to believe that his sentence estimate was a promise.

---

[14] Appellate counsel noted, from the comfortable position of hindsight, that appellant received the "paltry sum" of $7500 from the sale of the movie rights. Of course, at the time appellant entered the contract, he had no way of knowing whether his movie would end up on the cutting room floor. Moreover, he was supposed to receive 2% of the gross had he not defaulted on conditions of the contract (A-11).

Finally, in his § 2255 petition appellant failed to present this claim of ineffectiveness of counsel based on the ignorance-of-death-penalty, failure-to-explore-insanity-defense and conflict-of-interest arguments. Hence, they should not be entertained on appeal, the district court not having had an opportunity to rule on them. Concerning the two claims raised below—failure to bring the suicide attempt to the court's attention (which was only impliedly stated as a ground for relief) and an erroneous sentence promise—the record clearly refutes appellant's contention that his representation was constitutionally defective.

CONCLUSION

The district court's denial of appellant's § 2255 petition and his motion for reconsideration should be affirmed.

Dated: December 20, 1976

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

BERNARD J. FRIED,
GARY A. WOODFIELD,
CHERYL M. SCHWARTZ,
Assistant United States Attorneys,
Of Counsel.

APPENDIX

APPENDIX A

Affidavit of Mark A. Landsman

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

72 Cr. 1056

UNITED STATES OF AMERICA,

—against—

JOHN WOJTOWICZ,

Defendant.

State of New York
County of Kings ss:

MARK A. LANDSMAN, being duly sworn, deposes and says:

I am an attorney duly admitted to practice in the United States District Court for the Eastern District of New York and I maintain my offices at 66 Court Street, Brooklyn, New York 11201.

On or about August 23, 1972 I was appointed to represent the defendant JOHN WOJTOWICZ pursuant to the Criminal Justice Act.

JOHN WOJTOWICZ and co-defendant Robert Westenberg were charged in a four count indictment filed on or about August 31, 1972.

Count one charged the defendants with a violation of Title 18 Section 2113 a (bank robbery).

Appendix A—Affidavit of Mark A. Landsman

Count two charged the defendants with a violation of Title 18 Section 2113d (bank robbery with use of dangerous weapon).

Count three charged the defendants with a violation of Title 18 Section 2113e (taking of hostages during bank robbery).

Count four charged the defendants with entering into a conspiracy to commit the crimes enumerated in Counts 1 through 3.

On February 16, 1973 the defendant WOJTOWICZ entered a plea of guilty to Count two of the indictment with the understanding that at the time of sentence the remaining three counts would be dismissed by the Government.

On April 23, 1973 the defendant WOJTOWICZ was sentenced by the Honorable Anthony J. Travia, United States District Judge, to a term of imprisonment of twenty years under Count two of the aforementioned indictment. The Court, upon the United States Attorney's motion dismissed the remaining three counts at the time of sentence.

I have read the affidavits of defendant's wife Carmen Ann Wojtowicz, dated September 29, 1975, and defendant's mother Mrs. Theresa Wojtowicz, dated October 2, 1975, which allege that I stated that if the defendant pleaded guilty he would be sentenced to ten or fifteen years in prison.

I unequivocally state that I did not promise anyone connected with this case that the defendant would only

be sentenced to ten or fifteen years. In fact, on numerous occasions I made clear to the defendant and his family that the length of sentence was up to the judge alone and that I could not predict the sentence he would impose.

Dated: November 13, 1975
Brooklyn, New York

MARK A. LANDSMAN

Sworn to before me this
13th day of November, 1975

NOTARY RICHARD I. ROSENKRANZ
Notary Public, State of New York
No. 31-3656465
Qualified in New York County
Commission Expires March 30, 1976

APPENDIX B

KINGS COUNTY HOSPITAL CENTER

FORENSIC PSYCHIATRY SERVICE

Re: JOHN STANLEY WOJTOWICZ # 232448

Discharge Resume

This 27 year old male patient was admitted on 9/14/72 from United States Eastern District Court of New York charged with Bank Robbery (Armed)

(Include name and specifics of most serious charge)

In August 1972 he and a co-defendant named Arthur Westenberg entered a bank in Brooklyn, holding hostages at bey [sic] displaying weapons. These hostages were held for many hours in the bank and around midnight asked to be taken to Kennedy Airport to embark on a plane. Before entering the plane they were both apprehended.

The psychiatric diagnosis was

Unspecified Personality Disorder
Sexual Deviation — Other

(For mental status see attached report or letter)

On 10/6/72 he was transferred to Eastern District Court

Psychiatrist

Appendix B

KINGS COUNTY HOSPITAL CENTER
CLARKSON AVENUE, BROOKLYN, N.Y. 11203

October 6, 1972
Re: John Stanley Wojtowicz
ORDER: 72 Cr. 1056

Hon. Anthony J. Travia
United States District Judge
Eastern District Court
225 Cadman Plaza East
Brooklyn, New York

Your Honor:

In compliance to your request of September 12, 1972 attached find complete psychiatric examination report on the above named defendant.

Respectfully yours,

RAYMOND M. CHAITIN, M.D.

P.S.
Please keep these co-defendants separated due to the fear that Westenberg has of Wojtowicz and also Wojtowicz tells Westenberg how to answer questions. Westenberg has already been kicked in his testicles and is very fearful of Wojtowicz.

Appendix B

September 27, 1973

This is a 27 year old white male who was sent for psychiatric examination by Judge Travia of United States District Court. This examination was ordered on September 12 but was received by us with the prisoner on September 14. [When asked what he was charged with he said, "A guy in jail and the FBI said I robbed a bank and also the guys who were hitting at the airport." (He stated that he did not know what airport it was but then he smiled and said, "Kennedy.")] He stated that this was his first arrest and he had no previous psychiatric hospitalization except when he was an out-patient at St. Vincent's Psychiatric Hospital about three times this past year.

(Why did you go to St. Vincent's Hospital?)
"I tried to kill Ernie (Ernest Aron), my wife with a knife about February 1972, he was flirting with other men. I couldn't do it so instead I tried to kill myself but Ernie stopped me and said I should go see a psychiatrist. I went to St. Vincent's Hospital and saw a female psychiatrist but I couldn't relate to her nor her to me as she said I was dangerous because you don't kill someone whom you love and I should sign myself into the hospital for two weeks and give up all this homosexual foolishness and come home to my wife and two children."
(Have you ever had any other hospitalization?)
"Yes, I was hospitalized for a very rare condition (Giardia Lamblia infecting lower bowel; Lymphonodular Hyperplasia and terminal Ileum; status Post Australian Antigen positive Hepatitis)."

"I refused to be admitted for two weeks into the hospital as a psychiatrist considered homosexualism a mental ill-

ness and not a state of being that is one's individual rights. However, I did go into the hospital for the intestinal condition but when they wanted to do a biopsy I was fearful of it being cancerous, in fact, I had a dream that it was a cancer so I left the hospital the next day."

"I was married to Ernie in December of 1971. We were both on welfare and I stayed two days a week with Ernie as my wife was very passive and would lie back and I would have oral sex with him and I would have sex in his rectum and the rest of the week I could stay with my mother. Occasionally I would visit my wife, Carmen, and my son and daughter. I would not like to stay alone as I'm afraid of the dark and I think I see monsters like Frankenstein and Dracula unless someone is with me."
(Why didn't you sleep with the light on?)
"I do, then I'm not necessarily afraid."

(What other people have you been associated with?)
"Well there's Patrick. He is my fiancee."
(Are you cheating on Ernie, your wife?)
"No, cheating is to do something behind someone's back, not when your wife knows about it and goes along with it as we have an understanding."
(They [sic] why did you try to kill Ernie in February for flirting with other men?)
He smiled and said, "Well, a man sort of has more rights." He further stated, "I also love Carmen, my female wife, and my two children."
(How do you think Carmen feels about you cheating on her with Ernie and Patrick?)
"I let her go to bed with Danny and I do have sex with her once or twice a week. We have heterosexual sex, me on top of her most of the times. We don't have oral sex. I have oral sex with Ernie but with Patrick we have oral and rectal sex together."

Appendix B

(Who is Patrick?)
"Patrick is a friend that I met. He is more affectionate than Ernie. Ernie just lies there with her legs apart." (If you had your choice of Carmen, Ernie and Patrick and they were all in a room together, whom would you prefer?)
"I would go to bed with Ernie because I love him the most. In fact, I brought Ernie home to meet my family and after my father met Ernie, he called me a queer, a fagot and a whore. I got two knives and went after him but my brothers subdued me."

"Since Ernie wanted a transexual operation to make him into a real female, I went to Beneficial Loan and they turned me down. I couldn't get a job because they find out I was gay." (It was noted in the file that he was a good worker and had a three year stay in the Army from 1966 to 1969, as he signed up for an extra year to get training in electronics.) "Ernie was tired of being a man and it was a desperate situation. I could only borrow $600 from the Chase Manhattan because I had good credit rating."

He then skipped forward to August, 1972. On August 20 Ernie took an overdose of poison and was talking to a woman on the phone. She notified the police and they found him and took him to Long Island College Hospital. The next day they sent him to Kings County Hospital. "I felt very badly about it as my wife needed this operation. I went to Kings County Hospital and they refused to recognize me as her husband. I was very angry and on Monday, August 21 (he remembers the dates very well because it was the day after Ernie's birthday) after a verbal argument in G-Building they let me see Ernie.

Appendix B

I told the doctor that I wanted to take Ernie out the next day, Tuesday, August 22. I called the doctor at 11 A.M. and spoke to a Dr. Kaplan, I believe on the 4th floor. I told him as his husband I wanted him out and I had a shotgun, a rifle and a pistol in my car and I would like to get him out. I then went to a couple of banks to get money, small loans in order to make Ernie happy but I was not lucky and I got hold of Bobby (co-defendant named Robert Arthur Westenberg, who is Ernie's friend) and Sal (last name unknown who was co-defendant and was killed during the perpetration of the crime, whom he know from the Village). I gave Sal the pistol and after we were going to get the money we would come back to Kings County Hospital and would use it to get Ernie released. It was agreed that Sal, Bob and I would use the rifle, shotgun and pistol to get Ernie released if they refused us this time." He denies that he was going to use the guns to get money from banks.

He was asked if he heard voices or whether there were any signs of thought disorder, psychotic behavior or, etc. "I don't hear voices but sometimes I have thoughts in my head that tell me I should marry Ernie, buy the guns or kill my father. They're not voices from outside but they're my own decisions and thoughts." He has no delusions and does not appear to be overtly paranoid but there is some latent paranoia present at this time towards his father. He insists that he was becoming so mad and angry and pissed off on August 22 when he went from bank to bank and was turned down for a loan, that he does not remember what happened in the last bank except when he states, "They hit me at the airport and subdued me." He describes every detail and remembers going into a lot of banks including the last bank and stated, "The fire arms were in a box. We were going to use

them at Kings County Hospital and not at the bank." He denies remembering the exact details from the moment of announcing the robbery in the bank to when he was subdued in the car. He does remember Bobby and Sal being in the bank with him. He does not remember the conversations they had but does remember that in each bank they went into, he bought Eisenhower silver dollars which he put in his pocket and gave some to Bobby and Sal as a token for his appreciation for their assistance in this entire plot. He also felt that since they had some rare value, it would be good to save. It appears to this examiner that he is malingering from the time he used the firearms and announced the robbery in the bank to the moment of being subdued.

(What do you dream about?)
"I dream about being called a fagot and people wanting me to sign things."
(What does that remind you of?)
"That square female psychiatrist at St. Vincent's who wanted me to sign myself in for two weeks."
(Do you know the name of the bank on Avenue P and East 3rd Street?) I know where it is and it must have been the Chase Manhattan Bank as I have a good credit rating there, as they already gave me a loan of $600 and I didn't think they would check with the other branches and see that I already had a loan. I worked for banks for eight years and knew quite a bit of their procedures."
(Do you remember walking into the bank?)
"I don't remember."
(Do you remember walking up to the teller in the bank?)
"I don't remember.
(Do you remember giving the teller an order and emphasizing it with a pistol?)
"I don't remember.
(Do you have lapses of memory?)

Appendix B

"No, but sometimes I forget where I put things and once I was told I was at the World's Fair and I didn't remember it and at another time I was at a party and I forgot about it."

This defendant is 5' 4". He weighs 130 pounds. He is a sad, frightened, depressed looking male. Although his affect is inappropriate due to his depression, he was able to respond to humor and laugh at appropriate times. He was cooperative and did not offer any resistence to any of the questioning except when it involved the crime in its entirety. He is very guarded, evasive and manipulative when it comes to teh crime itself. But he admitted "Bobby, Sal and I talked about robbing a bank that day as a way of getting money for Ernie's operation." (Do you know that having firearms is against the law?) He became rather forthright and almost delivered a sermon which involved, "Every American has the right to carry or bear arms. The constitution allows it and that's why I had three weapons. Also I suppose they have the right to make you register your firearms as you have to register your automobile." He then went into a lengthy discussion in the most oriented and legal fashion on the position he holds in reference to firearms. He is bright and of above average intelligence. He completed high school and attended CCNY for one semester and was drafted into the Army. He knew the public figures and knew the functioning of a lawyer and judge. However, his discussion of a district attorney deserves mention as he said, "*A D.S. is a guy who yells in court and* he is usually the bad guy (he began to smile)."

He is represented by Mark A. Landsman, Esq. of 66 Court Street who sent us hospital records from St. Vincent's Hospital, a letter pertaining to his last will and testament which was sent to several members of his

family and friends, a copy of Gay Alliance of Brooklyn Newsletter in which he wrote an article under the name of Little John (Basso) on Sadism and a condensation of Mr. Landsman's notes from interviews with his family containing his observations of his conduct in court.

The examination started at approximately 9:15 and continued to 11:30 A.M. We have here a bisexual male who has sex with Carmen (female wife), Ernie (male wife) and Patrick (male sweetheart). He admits that having sex with the above partners, that he does not fantasize in order to come to an orgasm with thoughts of other partners but is receiving and giving love with the partner whom he happens to be with at that time.

His records from St. Vincent's Hospital were reviewed and it stated "schizophrenia chronic undifferentiated type and homosexualism." There is no psychosis or schizophrenia present in this defendant. To be so characterized it would be necessary for him to have a thought disorder, a mood disorder and a behavior disorder. There is no combination of these disorders present in this individual. His mood appears to be normally affected by everyday stresses within non-psychotic limits. As far as his bisexual activities is concerned, he is associated for his homosexual aspects with the Gay Liberation Unit which is a united group of homosexuals and bisexuals in Brooklyn whose purpose is to advance the freedom for homosexuals as a civil and legal right. Since homosexualism is not a psychosis but a sexual deviation in the form of a personality disorder which, according to the latest APA designation is considered a non-psychotic disorder.

In one of the notes supplied by his attorney, in reference to an attempt to knife his father, he stated, "I brought home my male wife for my family to meet. My father calls me a fagot and a prostitute. He was very disrespectful to my male wife and after my male wife left, he condemned me for it." The defendant stated, "My father is a heavy drinker and there's bad blood between us—as a result of my father condemning Ernie Aron (my male wife), I became markedly aroused and I took a knife and threatened my father but I allowed myself to be subdued by other members of the family." He, however, states hat he has good interpersonal relationships wih his family, wives, son and daughter. He has friends and is not a loner and does not exhibit any schizoid tendencies.

This examiner reviewed a will that was supplied in long-hand and in type-written form on photostat paper by his attorney. He stated that he wrote out the will in long-hand without any assistance from anyone. It is a well written document; the grammar and spelling are good, indicating that there is no mental deficit in his thinking processes. In reading this document of four pages, it exhibits sensitivities of a person's feelings, a sense of human values, dependency needs and the ability to love and to be loved. This word "love" which appears frequently in the document is not found in a withdrawn, isolated, disturbed type of individual. It exhibits a need to give and receive. These are normally accepted traits in both men and women.

It is the opinion of this examiner that he knows the charges as he said frequently during the examination, "I don't remember but I know now why I was arrested." When asked what don't you remember, he stated, "What

they say I did." When he was asked about what he said to his co-conspirators, Bobby and Sal before the robbery, he stated, "We can get money by robbing a bank." When reminded of this statement, he smiled and said nothing more about it. He refuses to talk about the offenses he is charged with by constantly repeating, "I can't remember." He is very well oriented, his sensorium is clear and his memory is good. He has no past history of any psychotic illness other than three brief visits to St. Vincent's Hospital. This was due to a lover's quarrel and the flirtations of his male wife. It may be self-serving to him to remember everything up to the moment of the alleged crime and then recall at the moment of the arrest. The scenario of this plot was well thought of by this defendant. However, in spite of his thought, insight, judgment, planning and timing, it turned out to be a failure. Whether he cares to recall it or not, is immaterial as he knows what he is arrested for. This is not the action of a disturbed person whose thinking processes are impaired. His article on sadism which appeared in the Gay Newsletter which was supplied by his attorney, Mr. Landsman, shows a well educated, fairly intelligent male who is functioning above the average level. It is my opinion that this defendant is competent and fit to proceed.

★ U. S. Government Printing Office 1976—714—018—AENY—028

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

Joanne Bracco being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 23 day of December 1976 he served a copy of the within

2 copies of Brief and Appendix for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:

Edward M. Chikofsky, Esq.

410 Park Avenue

New York, N.Y. 10022

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Joanne Bracco

Sworn to before me this

23 day of December 19 76

Carolyn N. Johnson

CAROLYN N. JOHNSON
NOTARY PUBLIC, State of New York
No. 41-4619298
Qualified in Queens
Term Expires March 30, 19 77